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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1977

No. 77-1478

PACIFIC GAS AND ELECTRIC COMPANY
and JAMES C. CARROLL,
Petitioners,

vs.

DONALD WIDENER,
Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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Respondent, Donald Widener ("Widener") opposes the petition of Pacific Gas and Electric Company ("PG&E") and James C. Carroll ("Carroll") for a writ of certiorari to the California Court of Appeal, First Appellate District, Division Four ("Court of Appeal"), filed on April 18, 1978.

Pursuant to Rule 40 (3), this response omits separate reference to the opinions and orders below and the constitutional provision involved and incorporates the pertinent Appendices of the Petition (Pet. App. .....).

JURISDICTION

The decision of the Court of Appeal is not a final judgment under 28 U.S.C. § 1257. The matter has been remanded by the Court of Appeal for retrial in which "all fact issues have been set at large." (Pet. App.A., 29a).[1]

QUESTIONS PRESENTED

1. Does the petition, seeking review of an interlocutory judgment of a state court not involving the news media, bring this case within the narrow exception to the finality requirement of 28 U.S.C. § 1257, fashioned by this Court in *Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469 (1975)?

2. When the jury has been properly instructed on the standard of liability under *New York Times Co. v. Sullivan,* 376 U.S. 254 (1964), is a defamation plaintiff nevertheless constitutionally restricted in proving "actual malice" to extracting an admission of subjective fault?

3. May the trier of fact draw the inference of a non-media defamation defendant's "actual malice" from a broad range of circumstantial evidence suggesting a motive to lie, notice of the need to investigate truth, and an indifferent investigation of the truth or falsity of the defamatory matter?

4. Is a state appellate court compelled by the United States Constitution to undertake an independent fact-finding role in all defamation appeals, even though the petitioner concedes that the jury was properly instructed?

5. Upon uncontradicted admissions of falsity is there an appellate obligation to find that the defamatory matter is substantially correct?

[1]The San Francisco Superior Court has set the matter for trial setting conference on July 27, 1978.

ADDITIONS TO STATEMENT OF THE CASE

Widener was an award-winning producer of television documentaries employed by station KNBC-TV, an owned-affiliate of the National Broadcasting Company. During the pre-interview conferences with Carroll he became convinced that Carroll was trying to prevent discussion of serious problems affecting public safety in the operation of PG&E's Humboldt nuclear plant. Widener, exercising editorial judgment, portrayed Carroll as evasive in the finished documentary.

Upon learning that the documentary had been broadcast and favorably reviewed in the *Los Angeles Times,* PG&E and Carroll launched a sophisticated campaign to intimidate the network into withdrawing the film from circulation. The charge of surreptitious taping and dubbing leveled at Widener was the centerpiece of this strategy. PG&E played on the anxiety of the major networks during the contemporaneous Congressional investigation of CBS' "Selling of the Pentagon," which allegedly involved surreptitious taping and dubbing of interview material from Defense Department officials.

PG&E's official in charge of public relations on the company's nuclear projects urged his superiors to authorize Carroll's letter of July 13, 1971 because it *"could be most effective in preventing this highly biased program from ever appearing on the air again —or, at least, causing the section referring to us to be wiped out."* (Pet. App.A., p. 9a, emphasis by the Court of Appeal). The petition does not disclose the date of this letter and characterizes it as merely a "letter of complaint." (Pet., p. 5).

The final letter charging that Widener had surreptitiously taped an off-camera discussion and dubbed it into the finished documentary was widely circulated by PG&E to numerous government officials, utility and nuclear industry trade associations, and advertising agencies who dealt with the networks in New York (Pet. App.A., p. 11a).

None of the PG&E officials responsible for sending the letter had seen the documentary. When a sufficiently intimidating effect had been worked on NBC, PG&E's Assistant to the President and chief lobbyist in Washington, D.C., confided that while Carroll's charge against Widener was "off base," *"the fact that NBC is upset at our aggressive approach is just what we wanted."* (Pet. App.A., p. 13a, emphasis by the Court of Appeal).

According to PG&E, Carroll was the only source relied upon for the truth of the surreptitious taping charge. The petition is incorrect in asserting that there was no evidence introduced that would have caused PG&E to doubt Carroll's veracity (Pet., p. 5).

The PG&E officials responsible for the letter knew that Carroll, their only source, was angry and upset and was not reliable (Pet. App. A., p. 18a); they knew that the charge against Widener was devastatingly defamatory in the television industry (Pet. App.A., pp. 11a-11b); and they knew that Carroll's charge was highly improbable (Pet. App.A., p. 18a). This was proper circumstantial evidence on which the jury could disbelieve PG&E's self-serving claim that it had no reason to doubt the truth of the charge or to consider Carroll unworthy of belief.

As the Court of Appeal concluded, after "an independent review of the evidence," Widener introduced clear and convincing evidence from which the jury could conclude that petitioner's—

> motive to suppress the film so overwhelmed its attention that all of its agents, who were in a position to control sending the letter, treated the question of truth or falsity as a matter of total indifference. (Pet. App.A., pp. 19a-19b).

THE CASE IS NOT APPROPRIATE FOR REVIEW BY THIS COURT

1. THE ISSUE FOR THE TRIER OF FACT TURNS ON CREDIBILITY AND DOES NOT RAISE CONSTITUTIONAL QUESTIONS OF EVIDENCE.

Over the vigorous dissent of Mr. Justice Rehnquist, this Court granted review in *Cox Broadcasting Corp. v. Cohn, supra,* 420 U.S. 469 (1975) on finding that the Supreme Court of Georgia had definitively resolved the constitutionality of a state statute imposing

criminal liability on the news media for publication of truthful matter of public interest obtained from public records. A narrow exception to the finality requirement of 28 U.S.C. § 1257 was fashioned in *Cox*, despite a pending retrial, because the chilling effect of the state rule "would make it very difficult for the media to inform citizens about the public business and yet stay within the law." (420 U.S. at 497).

The present petition asks this Court to extend the *Cox* exception to protect the public relations department of a private monopoly from having its credibility tested before a jury on the issue of indifference to the truth in a defamation case.

Such an exception would swallow up the finality requirement in every case colorably raising a First Amendment defense. Petitioners' suggestion of jurisdiction is incorrect. (Cf. *National Broadcasting Co. v. Niemi,* 46 U.S.L.Wk. 3602 (Mar. 28, 1978), *cert. den.* Apr. 24, 1978 (46 U.S.L.Wk. .....).

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2. ON THE MERITS THE WRIT IS INAPPROPRIATE

This Court has said that proof of "actual malice" turns on the "specific facts" of each case. *Time, Inc. v. Pape,* 401 U.S. 279, 292, (1971). Whether the evidence at trial constitutes such proof is a question "for the jury . . . to determine." *Time, Inc. v. Hill,* 385 U.S. 374, 394, n. 11 (1967). The evidentiary boundaries must be "marked out through case-by-case adjudication." *St. Amant v. Thompson,* 390 U.S. 727, 730 (1968).

The "patchwork of largely unarticulated evidentiary standards" (Pet., p. 9) which petitioners ask this Court to survey on review of this case is merely the common law process at work in the rules of evidence throughout the state and federal courts. The Constitution does not condemn this evolutionary fabric woven throughout our system of law.

Whether the press will be deterred and the free flow of information imperiled by discovery of thought and opinion in the editorial room [the question presented in *Herbert v. Lando, cert. granted,* 46 U.S.L.Wk. 3577 (March 20, 1978) (No. 77-1105)] plainly is not involved in this case. Petitioners' contention that this case "touches" on this question is transparently a bootstrap.

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3. THE ALLEGED CONFLICT AMONG THE CIRCUITS IS INAPPLICABLE AND ILLUSORY.

This is not a circuit court case within the meaning of Rule 19(b).

In any event, *de novo* appellate review in defamation matters has occurred only when (a) the trier of fact has applied an erroneous constitutional standard *and* (b) the news media remain threatened with serious liability by the lower court's erroneous resolution of the constitutional question (See *Maheu v. Hughes Tool Co.,* 569 F.2d 459, 464-5 (9th Cir., 1977)). The petition does not bring this case under *either* test.

4. THE RECORD IN THIS CASE DOES NOT LEND ITSELF TO ANNOUNCING A NEW EVIDENTIARY RULE RESPECTING THE TRUTH OF THE DEFAMATORY PUBLICATION.

By uncontradicted admissions of petitioners' witnesses at trial, the charge of surreptitious taping and dubbing, admitted to be false (Pet., App.A., pp. 10a-11a), was the "main point" and essential thrust of the defamatory letter (Pet., App.A., pp. 9a-10a). The Assistant to the President of PG&E, whose understanding was derived only from the letter itself, paraphrased it as charging—

> "use, over the air, of a tape-recording of *pre-interview* discussions between an NBC reporter and one of our senior engineers, Mr. J. C. Carroll. This recording was made without the knowledge of Mr. Carroll. To add insult, the actual interview which was later taped openly, was not used in any way in the 'documentary' TV film . . ." (Trial Exhibits 5, 6, 20; *original emphasis*).

On this and other evidence, the Court of Appeal found the defamation false in all essentials—as did the jury, properly instructed on truth as a defense.

CONCLUSION

Respondent has been forced to wait seven years to vindicate his reputation. The Court should promptly deny the petition this Term to avoid further delay in taking the matter to trial for a second time.

Dated, May 1, 1978

Respectfully submitted,
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